

## Some Comments about Discovery and Disclosure in Montana

### I. Discovery from the Prosecution

A. **The “open file” policy**: By law Montana prosecutors are required to “make available to the defendant for examination and reproduction” any material that is discoverable. The discovery obligation extends ONLY to “written or recorded material or information within the prosecutor's control.”

B. In preparing a case it is obvious that care must be taken to ensure that material not specifically “within the prosecutor’s control” is not overlooked. An example not clearly covered by this section is material that local law enforcement may not have turned over to the prosecutor.

C. When faced with defense-initiated discovery motions Montana’s district courts generally shape their responses to conform to the local “open file policy.”

D. Therefore, as defense counsel it is critical that you understand what the “open file” policy is in your local jurisdiction.

### II. Disclosure to the prosecution.

A. **Disclosure**: Under 46-15-323, MCA the defense must disclose in writing:

- a. Evidence of good character
- b. Alibi
- c. Compulsion
- d. Entrapment
- e. Justifiable use of force
- f. Mistaken identity
- g. Lack of mental state due to mental disease or defect

B. **Statements**: See, *Montana v Carkulis*, 229 Mont. 265 (1987) which defines a statement as “tapings, transcriptions, writings or other means used to memorialize the witness as to his observation or impression of a situation or event, and which may be used either to refresh the recollection of the witness or to impeach him at trial.”

C. **Experts**: With regard to “experts” the defense must disclose:

- a. Names and addresses of experts
  - b. Papers used at trial
  - c. Documents used at trial
  - d. Photographs used at trial
  - e. Other tangible objects
- D. What defense counsel does NOT have to disclose:
- a. Summaries of testimony
  - b. The defendant need not include a privileged report or statement unless the defendant intends to use the privileged report, statement or witness at trial.
  - c. "Privileged reports or statements"
  - d. "Superseded notes" or "work product" of the attorney.
  - e. Where disclosure would result in a risk or harm outweighing usefulness (46-15-327, MCA)
- E. **Work product:**
- a. The United States Supreme Court has emphasized that special attention must be given "to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews."
  - b. While this type of material is not always protected, the Court "stressed the danger that compelled **disclosure** of such memoranda would reveal the attorney's mental process."
  - c. Therefore, a memorandum prepared by an attorney from his or her recollection of an oral interview with a witness is the attorney's **work product**.
  - d. In Montana, the labeling of an item as opinion **work product** does not prevent the item from discovery all together. However, the discovery of opinion **work product** is rare and requires more than a substantial need for the item and the inability to obtain it elsewhere.
  - e. If, in representation of the client, a lawyer or investigator acquires **work-product** objects *which the defense knows in good faith will not be used at trial*, they are not subject to discovery under the order of the court. Further they are protected by the provisions of 46-15-322, MCA, since all matters which are privileged upon the trial are privileged against **disclosure** in the discovery procedure.

- f. There are safeguards in that a protective order may be sought under 46-15-328, MCA.

**Tip:** When trying to determine whether something you have in your possession is “discoverable” by the prosecution you should focus on whether the item in question contains your “mental impressions” which are or may become “directly at issue” in the case.